STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Docket No. 2217991

KAY WILKIE, as Independent Personal Representative of the Estate of PAUL K. WILKIE, and JANNA FRANK

Plaintiffs-Appellees,

Docket No.: 119295

V

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

PLAINTIFF-APPELLEE WILKIE'S BRIEF

ORAL ARGUMENT REQUESTED

Thomas A. Doyle (P31559)
Attorney for Plaintiff-Appellee Kay Wilkie
THOMAS A. DOYLE, P.C.
504 S. Creyts Rd., Suite C
Lansing, MI 48917
517-323-7366

TABLE OF CONTENTS

INDEX OF AUTHORITIES

ACQUIESCENCE IN APPELLANT'S JURISDICTIONAL SUMMARY

Plaintiff-Appellee Wilkie concurs in the Defendant-Appellant's STATEMENT OF BASIS OF JURISDICTION.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. WHERE MULTIPLE CLAIMANTS ARE ENTITLED TO RECOVER UNDER AN UNDERINSURED MOTORIST COVERAGE ENDORSEMENT, ARE THEIR CLAIMS TO BE OFFSET BY THE FULL LIABILITY LIMITS OF THE UNDERINSURED DRIVER/OWNER, OR BY THAT PORTION OF THOSE LIMITS WHICH EACH HAS ACTUALLY RECEIVED?

The Court of Appeals answered: by that portion of the underinsured driver/owner's limits actually received.
The Plaintiffs-Appellees answer: by that portion of the underinsured driver/owner's limits actually received.
The Defendant-Appellant answers: by the full liability limits of the underinsured driver/owner.

II. DOES THE TERM "AVAILABLE" IN THE UNDERINSURED MOTORIST ENDORSEMENT AT ISSUE GIVE RISE TO AN AMBIGUITY WHICH MUST UNDER UNIVERSAL RULES OF CONSTRUCTION BE CONSTRUED FAVORABLY TO THE PLAINTIFFS-APPELLEES, SO AS TO MEAN "ACTUAL" AND NOT "THEORETICAL" AVAILABILITY OF OFFSETTING FUNDS?

The Court of Appeals answer: Yes
The Plaintiffs-Appellees answer: Yes
The Defendant-Appellant answers: No

III. CAN THE "RULE OF REASONABLE EXPECTATIONS" BE APPLIED INDEPENDENT OF A FINDING OF AMBIGUITY?

The Court of Appeals answer: Yes
The Plaintiff-Appellee Wilkie answers: Yes
The Defendant-Appellant answers: No

IV. IS THE "RULE OF REASONABLE EXPECTATIONS" A SOUND PRINCIPLE OF CONTRACT LAW.

The Court of Appeals did not answer this question.
The Plaintiff-Appellee Wilkie answers: Yes
The Defendant-Appellant answers: No

COUNTER-STATEMENT OF FACTS

Plaintiff-Appellee Wilkie basically concurs with the STATEMENT OF FACTS set forth by Defendant-Appellant, excepting for the following points, which are made for purposes of clarification.

The limits of coverage on the underinsured coverage in the Auto Owners policy is $100,000 per person *and $300,000 per accident.*

Each of the two Plaintiffs - Janna Frank and the Estate of Paul Wilkie - recovered, with the full consent and acquiescence of Auto Owners[1], the sum of $25,000 from the insurance carrier for the tortfeasor. In addition, each has received from Auto Owners, as indicated in its brief, the sum of $50,000.

The lower court, in granting summary disposition to the Plaintiffs, held that only the sums actually received by each of the plaintiffs from the underinsured driver - $25,000 - was to be set off against each of their separate claims for damages, admitted to exceed the $100,000 per person limit, as insured parties under the underinsured motorist coverage. Hence, each of the plaintiffs was held entitled to recover from Auto Owners the sum of $75,000.

---

[1] In the Stipulation and Final Judgment, the Defendant-Appellant has waived any defense based upon the Plaintiffs' settlement with the underinsured motorist's insurer, or its distribution.

ARGUMENT

I. WHERE MULTIPLE CLAIMANTS ARE ENTITLED TO RECOVER UNDER THE UNDERINSURED ENDORSEMENT HERE AT ISSUE, THEIR CLAIMS ARE TO BE OFFSET BY WHAT EACH CLAIMANT ACTUALLY RECEIVES FROM THE TOTAL INSURANCE COVERAGE AVAILABLE TO THE UNDERINSURED DRIVER/OWNER, AND NOT BY THE TOTAL LIMITS OF THAT COVERAGE.

A. The Policy Language Calls for an Offset Only with Respect to what is Actually Received by the Insured

The Defendant-Appellant correctly notes that there is no applicable statute in Michigan providing guidance on the obligation of an insurer under underinsured motorist (UIM) coverage, and that the rights and duties of the parties under such coverage must therefore be determined by the language of the policy.

The Plaintiff further concurs with the Defendant-Appellant's position that the policy language at issue is unambiguous,[2] and that its terms therefore are to be construed according to their plain and ordinary meaning. (citations)

The Defendant-Appellant has acknowledged that Mr. Ward's vehicle was an "underinsured automobile" and that each of the Plaintiffs has a claim as an "insured" under the underinsured motorist coverage.

The underinsured motorist endorsement states that the insurer will "pay compensatory damages any person is legally entitled to recover . . from the owner or operator of an

underinsured vehicle." The policy, therefore, clearly gives a distinct and enforceable claim to each

---

[2]Unless, that is, the term "available" is found to be ambiguous, in which case the ambiguity is to be resolved in favor of the Plaintiffs. See Argument II.

person qualifying as an insured.

Under the clauses limiting liability, which have the effect of purporting to "take away" that which the basic coverage provision has granted, the endorsement states that the amount the company will pay "will be reduced by any amounts paid or payable for the same bodily injury . . . by or on behalf of any person or organization who may be legally responsible for the bodily injury." Since it is obvious that two persons cannot have sustained the same bodily injury, this clause makes it even more clear that each person qualifying, as do each of these Plaintiffs, as an "insured" has a separate and distinct claim for the underinsured benefits up to the applicable limits.

The Defendant-Appellant does not dispute that each of these Plaintiffs-Appellants has such a separate and distinct claim. The only dispute is with respect to the amount of the set-off to be applied to the recovery of each under section 4 of the Underinsured Motorist Coverage endorsement.

That section provides that the limit of the insurer's liability shall "not exceed the lowest of . . . the amount by which the Underinsured Motorist Coverage limits stated in the Declarations exceed the total limits of all bodily injury liability . . policies available to the owner or operator of the underinsured automobile . . ."

The "Underinsured Motorist Coverage limits stated in the Declarations" are $100,000 per person and $300,000 per occurrence. The "total limits of all bodily injury liability . . policies available to the owner or operator of the underinsured automobile" to all claimants are $50,000.

By virtue of the limits expressed in the Declarations, the limits on the claims of each of the Plaintiffs-Appellants was $100,000. By virtue of the division of the total proceeds payable by Ward's estate, which distribution was acquiesced in by the Defendant-Appellant, as to each claimant, the "total limit of all bodily injury liability . . policies available to the owner or operator of the

underinsured vehicle" was $25,000.

It is significant that Section 4 begins with the phrase "Our Limit of Liability *for Underinsured Motorist Coverage* shall not exceed . . ." In the context of the circumstances presented in this case, this clause simply means that the Defendant-Appellant's liability for all claims to be made under the underinsured coverage shall not exceed the amounts stated in the Declarations, being $100,000 per person, and $300,000 per occurrence. If the underinsured coverage were to be limited as the Defendant-Appellant contends that it is limited, the prefatory phrase cited above would say "our Limit of Liability for each claim made under this Underinsured Motorist Coverage . . ."

The subsection which follows - subsection 4.b.- simply goes on to further explain the limitation contained in sub-section 4.a. by making it clear that limitation is not increased by the number of claims made, persons, injured, or automobiles involved in the occurrence. In other words, if five people, or ten people - or any number of people greater then three - were severely injured in an accident caused by an underinsured automobile, the Defendant-Appellant would still be liable for no more than the $300,000 aggregate limit, less the limits available under the coverage possessed by the underinsured vehicle.

Here, each claimant had a claim which was admitted to exceed the $100,000 per person limit under the UIM coverage. There being two claimant's, the Defendant-Appellant's exposure was for $200,000. Those two claimants have received in the aggregate a total of $50,000 from the underinsured driver, that being the "total limits of all bodily injury liability . . . policies available to the owner or operator of the underinsured automobile." There therefore remains payable to each claimant on the UIM coverage the sum of $75,000. The Defendant-Appellant will, in fact, have received the benefit of the offset of the "total limits" of the underinsured driver. This is the only reasonable

meaning of the policy provisions.

The position taken by the Defendant-Appellant would lead to the ludicrous result that each injured person is to be deemed as having received the entire limits of the coverage of the underinsured vehicle, when that is manifestly impossible. It has always been obvious in this case that each Plaintiff-Appellant could not receive the entire sum of $50,000 from the insurer of the Ward vehicle; that they would have to share - as they have - in its distribution. The Defendant-Appellant's position with respect to sub-sections 4.a. and 4.b. would render nugatory the Declarations and the coverage provisions discussed above, the clear import of which are that "each person" is to be made whole, up to the limits of the underinsured coverage, for his or her damages for bodily injury caused by an underinsured motorist.

B. The Michigan Cases Cited by the Defendant-Appellant Do Not Support the Defendant-Appellant's Position

The Plaintiffs-Appellants never had a quarrel with the idea that the limit on their recoveries would be the limits of the underinsured coverage and not their actual damages. Nor have they disagreed with any of the cases which have been cited by the Defendant-Appellant. The Plaintiffs-Appellants have never taken the position which was at issue in those cases by claiming that they are entitled to recover from the underinsured carrier the "excess" between their actual damages and the amount recoverable from the tortfeasor. Therefore, to engage in esoteric discussion about the distinctions that have been made between the "excess" vis a vis the "gaps in coverage" theories of underinsured coverage serves no useful purpose. And no case which decides merely the amount recoverable under UIM coverage where there is a single claimant - as do most of the cases cited by

the Defendant-Appellant - has relevance.

In *Nankervis v Auto-Owners* 198 Mich App 262; 497 NW2d 223 (1993), the UIM endorsement contained similar language. The plaintiff there obtained $20,000 from the tortfeasor's carrier, then attempted to recover the entire $25,000 limit available under the UIM coverage, since her actual damages were claimed to exceed the amount which she had been paid by the tortfeasor's carrier by more then $25,000. The Court of Appeals rejected the plaintiff's argument, concluding that her recovery under the UIM coverage must be limited to $5,000 - being the difference between the UIM limits and the amount recovered from the tortfeasor's carrier. The Plaintiffs-Appellants in this case have no quarrel with this result, which is entirely consistent with their position that the amount actually received by a claimant under UIM coverage from the underinsured driver is to be offset against the claimant's recovery. The Plaintiffs-Appellants are not making the claim made by the plaintiff in *Nankervis* that the amount against which the amount received from the underinsured driver is the amount of actual damages sustained by the claimant.

In *Auto-Owners Insurance Company v Leefers* 203 Mich App 5; 512 NW2d 324 (1993) there were multiple claimants. But the decision in that case did not resolve the issue here presented. It revolved around the availability to one of the claimants of the UIM coverage contained in a second policy, which had been issued to the grandfather of one of the claimants. The sole question resolved on appeal was simply whether, under the terms of that policy, the UIM coverage was "available" to that claimant. A more complete discussion of that case is presented in Argument II.

The case of *Lotoszinski v State Farm Ins.* 417 Mich 1; 331 NW2d 467 (1982) addressed only the issue of whether a tortfeasor whose liability limits, although sufficient to meet the statutorily required minimums were woefully below the actual damages sustained by the plaintiff, could be

"uninsured" under either the relevant statues or the uninsured motorist endorsement of the particular policy. The court ruled that it was constrained by the plain language of the statute and the policy to hold that such an inadequately insured operator/ owner was not "uninsured." There is nothing in that decision that in any way supports the position here being taken by the Defendant-Appellant.

C. The Reported Cases of Other Jurisdictions Which Are in Point Uniformly Reject the Defendant-Appellant's Position.

Not only are there no Michigan cases supportive of the Defendant-Appellant's position, but every case from every other jurisdiction which has considered the issue of the offset to be applied against UIM coverage where there are multiple claimants has rejected the Defendant-Appellant's argument.

In *Gust v Otto and Mutual Service Casualty Insurance Company* 147 Wis. 2d 560, 433 NW 2d 286 (1988), several occupants of a vehicle carrying underinsured motorist coverage with a single limit of $500,000 made claim on that coverage. The accident was caused by the negligence of the other driver, whose liability insurance limits were $300,000 (single limit). The tortfeasor's insurer paid over the entire $300,000, which was divided among several claimants, all of whom as occupants of the vehicle covered by the underinsured policy qualified as

'insureds" under that coverage. Of that sum, the Plaintiffs received $248,000. The Plaintiffs' actual damages had been determined by arbitration to be $479,000. The Defendant-Appellant insurer, making the same argument as is being made in the instant case, claimed that its liability under the underinsured coverage should be reduced by the total limits of all bodily injury liability available under the tortfeasor's policy, that being $300,000. In other words, instead of beginning with the amount of the $248,000 actually received by the insured claimant, the UIM coverage would begin with the entire

$300,000 that had been paid by the tortfeasor's insurer to all claimants. This, of course, is precisely the argument being made by the Defendant-Appellant in this case.

The UIM coverage in Gust contained a clause similar to sub-section 4.b.1. of the policy issued by this Defendant-Appellant. It stated that "the limits of liability for underinsured Motorist coverage shall be reduced by the total limits of all Bodily Injury Liability insurance policies applicable to the person or persons legally responsible for such damages." A subsequent clause stated that "the company's obligation hereunder shall apply only to such damages that are in excess of the total limits of all Bodily Injury Liability insurance policies applicable to the person or persons legally responsible for such damages and available to cover the insured's damages."

Noting that "an insurance policy must be construed to give effect to the intention of the parties", the test for which intention "is what a reasonable person would have understood the words to mean," the court rejected the Defendant-Appellant insurer's position, stating:

> "Here, the amount available for the insured's damages did not amount to $300,000, (the tortfeasor's) policy limit. Instead, the amount available for the insured's damages amounted to $248,184.10. The remaining $51,815.90 was awarded to (the Plaintiff's) passenger, Struzyk. (The Defendant insurer) is entitled to reduce its underinsured motorist coverage only by the portion of the total bodily injury limit specifically available to cover the insureds damages. . . (Its) interpretation would allow itself to benefit from a credit not received by its insured. The most equitable reading of the policy requires (the Defendant insurer) to reduce their underinsured motorist coverage by the amount of their insured's underlying recovery, in this instance $248,184.10."

In *Goughan v Rutgers Casualty Insurance Company* 238 N.J. Super. 644, 570 A.2d 501 (1989), the factual pattern was strikingly similar to the one presented by the instant case. The Plaintiff-insured's had UIM coverage with limits of $100,000 per person, and $300,000 per occurrence. The tortfeasor's limits were $15,000 per person, and $30,000 per occurrence. The Plaintiff's and their passenger each received $15,000 from the tortfeasor's insurer. The Defendant-

Appellant insurer claimed, as does the Defendant-Appellant insurer in this case, that its liability to the Plaintiffs under the UIM coverage should be offset by $30,000, the entire "per occurrence" limit of the tortfeasor's liability policy. The New Jersey appellate court rejected this claim, interpreting prior appellate decisions which required the reduction of liability for UIM coverage by "the tortfeasors' full available policy limit" to mean in this multiple-claimant situation that the UIM coverage should be reduced only by what a particular claimant has actually received from the tortfeasor's insurer:

> "It would be unfair and an abuse of the statutory policy to permit a deduction by the UIM carrier of the full limits of the tortfeasor's policy when those limits are not available to its insured. It is the amount which can be recovered (the 'full available policy limit') by the UIM insured from the tortfeasor's insurer which is to be deducted from the amount of the UIM coverage. In the present case, that amounts to $15,000, not $30,000."

In *Austin Mutual Insurance Company v King* 29 F.3d 385 (CA 8, 1994), the single limit of the tortfeasor's liability insurance was $100,000, while the UIM limits were $50,000 per person and $100,000 per occurrence. The UIM insured and two of his passengers were seriously injured, while another three of his passengers were killed in the accident. The tortfeasors insurer paid over the entire $100,000, which was distributed among the several claimants or their estates. The UIM insurer claimed that it had no liability to any of the claimants, because its maximum '$100,000 per accident" exposure was canceled out by the $100,000 limits of the tortfeasor's liability insurance, which was paid over, in the aggregate, to all claimants. It referred to the provision in its UIM coverage which required that it be "reduced by all sums paid because of the 'bodily injury' by or on behalf of persons or organizations who may be legally responsible." Certainly its argument has more appeal than that of the Defendant-Appellant in this case, in view of the fact that the overall "per accident" limit under the UIM coverage there was $100,000. The court, however, rejected the UIM

insurer's argument, holding that it had exposure as to each claimant in the amount of $50,000 (resulting in total claims of $350,000) - that being the "per person" limit - notwithstanding the overall $100,000 "per accident" limit. The court concluded that "to accept Austin Mutual's argument would mean that King (the insured under the UIM coverage) received no underinsured motorist coverage despite paying a premium for it."

In *Francis v Travelers Insurance Company* 581 So.2d 1036 (1991), the Court of Appeal of Louisiana held that a UIM insurer was not entitled to a credit against the coverage for the entire amount of the liability limits of the tortfeasor as to claimants not receiving that amount but having to share that amount with other claimants. The insurer, it ruled, "should be entitled to credit only for the liability coverage available to the insured." (Id., at 1043)

The North Dakota case cited by the Defendant-Appellant in its brief - *Score v American Family Mutual Insurance Company* 538 NW2d 206 (ND, 1995) is inapposite, for it - like the Michigan cases cited by the Defendant-Appellant - was concerned with the single claim of a single "insured", and merely decided that the amount actually received by the UIM insured from the tortfeasor's insurer must be offset not against the UIM insured's actual damages, but against the UIM limits. This, of course, is not the issue involved in the instant case.

Finally, the Missouri case which the Defendant-Appellant cites - *Hinshaw v Farmers and Merchants Insurance Company* 912 SW2d 70 (1996) - has no bearing on this case, for the sole issue there decided by the Missouri Court of Appeals was that the tortfeasor's vehicle was not an "underinsured vehicle" under the terms of the UIM coverage. In that case - unlike this - the UIM coverage limits were identical with the liability limits of the tortfeasor. No claim has been made by the Defendant-Appellant in this case that the Ward vehicle was not "underinsured," nor could it be

made, in view of the fact that the UIM coverage limits here clearly exceed the limits of and amounts paid by the insurer of the Ward vehicle.

II. THE TERM "AVAILABLE" IN THE UIM COVERAGE GIVES RISE TO AN AMBIGUITY WHICH MUST UNDER UNIVERSAL PRINCIPLES OF CONSTRUCTION BE CONSTRUED FAVORABLY TO THE PLAINTIFFS-APPELLANTS SO AS TO MEAN "ACTUAL" AND NOT "THEORETICAL" AVAILABILITY OF OFFSETTING FUNDS.

It is "hornbook" law that:

> ". . (I)f a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances, then the contract is ambiguous and should be construed against its drafter and in favor of coverage." *Raska v Farm Bureau Mutual Ins Co. of Michigan* 412 Mich 355, 361-362; 314 NW2d 440 (1982).

In *Auto-Owners Insurance Company v Leefers* 203 Mich App 5; 512 NW 2d 324 (1993), the Court of Appeals was confronted with the issue of whether a passenger in a vehicle with UIM coverage could, having shared in a distribution of proceeds from the tortfeasor's liability carrier which was inadequate to cover the passenger's damages, recover under the UIM coverage of *another* policy issued to the passenger's grandfather.[3] The UIM endorsement under the grandfather's policy stated that its coverage was not applicable as to injuries sustained by an insured while a passenger in a vehicle the owner of which "has insurance similar to that afforded by this coverage and such coverage is *available* to the insured." (emphasis added) The question, of course, was whether the UIM coverage on the vehicle in which the passenger was riding when injured was "available" to her, therefore barring her recovery under her grandfather's UIM coverage. The Court of Appeals concluded that it was.

What is important for the instant case is the finding of the *Leefers'* court that the term "available" created an ambiguity which required application of the customary rules of construction

---

[3] The passenger resided with her grandfather and was therefore eligible for coverage under his policy.

of insurance contracts, including the rule that ambiguities be resolved against the insurer and in favor of the insured. The court said:

> "In the instant case, we are faced with the task of construing an exclusion containing the term 'unavailable.' While no court in this state has specifically construed that term, courts of foreign jurisdictions have done so (citations omitted). Each of those courts concluded that the term is ambiguous and is to be construed against the insurer. (citations omitted) Each of the courts also concluded that *the term 'available' when construed in favor of the insured, meant 'actually available' or 'accessible', or that which is reasonably available, as opposed to that which is theoretically or hypothetically available* (citations omitted; emphases added).
>
> "In the instant case, we agree that the term 'available' is ambiguous, inasmuch as it is capable of being defined in different ways (citations omitted). Moreover, *we agree with those jurisdictions cited above that have construed the term to mean that which is 'actually' or 'reasonably' available to the insured."* (emphases added)

The court's reasoning in *Leefers* is eminently applicable to the instant case. What this Defendant-Appellant is claiming is that the full $100,000 limits of the liability coverage on the Ward vehicle are "available" to each of the Plaintiffs-Appellants, even though it is manifestly impossible that each claimant can obtain them. This is the "theoretical" or "hypothetical" availability condemned by the court in *Leefers*. The fact of the matter is that only $25,000 of the Ward limits were "available" to each of these Plaintiffs-Appellants, construing - as we must - that term favorably to them. The Defendant-Appellant claims that the cases are distinguishable because in the policy in *Leefers* the clause said "available to the insured", while the policy language here says "available to the owner or operator of the underinsured vehicle." But it is a distinction without a difference, for under the principle of underinsured motorist coverage, what is "available" to the insured is the same thing that is "available" to the tortfeasor.

III. THE "RULE OF REASONABLE EXPECTATIONS" CAN BE APPLIED INDEPENDANT OF A FINDING OF AMBIGUITY.

To find the answer to this Court's question, whether the "rule of reasonable expectaitons" can be applied independent of a finding of ambiguity, one need look no further than previous rulings by this Honorable Court. When called upon to interpret language used in an insurance contract in *Raska*, supra, this Court stated in part:

> As a consequence Michigan and other courts in this country have generally recognized two important rules in construing insurance contracts. The first rule is the common traditional black-letter law that a contract will be construed against the drafter in case of ambiguity or contradictions. Our Court spoke to this in an insurance contract as follows:
>
> "It is a principle of law too well established in this jurisdiction and others to need discussion or citation of authorities, that a policy of insurance couched in language chosen by the insurer must be given the construction of which it is susceptible most favorable to the insured ; that technical constructions of policies of insurance are not favored; and that exceptions in an insurance policy to the general liability provided for are to be strictly construed against the insurer. (Citations omitted).
>
> The second rule is the outcome of long application of the first rule by the courts and is often referred to as the rule of reasonable expectations. This Court spoke to that rule in Zurich Ins Co. v. Rombough, 384 Mich. 228, 232- 233, 180 N.W.2d 775 (1970), as follows:
> "Justice Tobriner, writing for the California Supreme Court in the case of Gray v. Zurich Ins Co, 65 Cal.2d 263, 269-270, 54 Cal.Rptr. 104, 419 P.2d 168 (1966), construing similar provisions said:
>
> " 'In interpreting an insurance policy we apply the general principle that doubts as to meaning must be resolved against the insurer and that any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.
> " 'These principles of interpretation of insurance contracts have found new and vivid restatement in the doctrine of the adhesion contract. As this court has held, a contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a "take it or leave it basis" carries some consequences that extend beyond orthodox implications. Obligations arising from such a contract inure not alone from the consensual transaction but from the

relationship of the parties.

" 'Although courts have long followed the basic precept that they would look to the words of the contract to find the meaning which the parties expected from them, they have also applied the doctrine of the adhesion contract to insurance policies, holding that in view of the disparate bargaining status of the parties we must ascertain that meaning of the contract which the insured would reasonably expect.' "

The "first" rule referred to by this Court is that where there is an ambiguity, the insurance policy will be interpreted against the drafting insurance company. This "black letter" rule would apply whenever there is an ambiguity in an insurance policy. Thus, if there is an ambiguity, no other rule of construction is necessary.

The "second rule", being the "rule of reasonable expectations", requires a court, because of the disparate bargaining status of the parties, to ascertain the meaning of an insurance policy based upon what the insured would reasonably expect.

This Court later described the "rule of reasonable expectations as being an "adjunct" to the rules of construction of insurance contracts *Powers* v *Detroit Automobile Inter-insurance Exchange* 427 Mich 602, 398 NW2d 411 (1986). The Court even noted in footnote number 7 to the plurality opinion in *Powers*, supra, "Our understanding of reasonable expectations does not require an ambiguity as a prerequisite to the application of the doctrine".

More recently, this Court, again, distinguished between the long recognized rule of construction where ambiguity is interpreted in favor of the policy holder, and those situations where there is no ambiguity and the rule of reasonable expectations requires the court to determine the reasonable expectations of the insured. In *Vanguard Insurance Company* v *Clarke*, 438 Mich 463, 475 NW2d 48 (1991), this Court states:

In contrast, this Court has also long recognized that " 'wherever there are two constructions that can be placed upon the policy, the construction most favorable to the policyholder will be adopted.' " (citation omitted). Furthermore, this Court will

> strictly construe against an insurer exceptions in an insurance policy that preclude coverage for the general risk. .(citation omitted) *These rules of construction apply where some ambiguity exists regarding the scope of coverage of an insurance policy.* Because no ambiguity exists regarding the exclusion in the case at bar, the insured cannot prevail on the basis of the rules of construction that favor coverage *(emphasis added).*
>
> The inquiry regarding coverage does not end with application of the rules of construction, however. This Court has also recognized that the rule of reasonable expectation comprises "[a]n adjunct to the rules of construction of insurance contracts...." (*Powers*, supra). This rule is particularly applicable in take-it-or-leave-it standardized contracts such as insurance policies.
>
> Under the rule of reasonable expectation, this Court will examine whether "the policyholder, upon reading the contract language is led to a reasonable expectation of coverage." (citation omitted)

After concluding that no ambiguity existed in the policy at issue, this Court indicated that lack of ambiguity did not end the inquiry, and went on to discuss the rule of reasonable expectations. Had ambiguity been required, and the Court having found no ambiguity, then there was no need to go on to consider the rule of reasonable expectations.

A review of the foregoing decisions of this Court, makes it clear that this Court has always been of the opinion that the rule of reasonable expectations applies independently of a finding of ambiguity.

As presented in Argument II above, the insurance policy at issue in this case does contain an ambiguity. Therefore it is not necessary to apply the rule of reasonable expectations in order to find for Plaintiff-Appellee Wilkie.

IV. THE "RULE OF REASONABLE EXPECTATIONS" IS A SOUND PRINCIPLE OF CONTRACT LAW.

As noted in the prior Argument, this Court has recognized the viability of the rule of reasonable expectations since 1982 when it issued its opinion in *Raska*, supra. The rule is premised upon the fact that an insurance contract is not a negotiated agreement between equal parties but, rather, is an adhesion contract. That is, a contract that is drafted unilaterally by the dominant party, and is presented to the weaker party on a take it or leave it basis. The insured really has no opportunity to bargain the terms of the insurance policy and, therefore, special protection is afforded to the insured. This court in *Raska*, supra, and *Powers*, supra, in considering the premise for the rule of reasonable expectations, quoted with approval the following from *Gray v. Zurich Ins Co*, 65 Cal.2d 263, 269-270, 54 Cal.Rptr. 104, 419 P.2d 168 (1966):

> " 'These principles of interpretation of insurance contracts have found new and vivid restatement in the doctrine of the adhesion contract. As this court has held, a contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a "take it or leave it basis" carries some consequences that extend beyond orthodox implications. Obligations arising from such a contract inure not alone from the consensual transaction but from the relationship of the parties.
> " 'Although courts have long followed the basic precept that they would look to the words of the contract to find the meaning which the parties expected from them, they have also applied the doctrine of the adhesion contract to insurance policies, holding that in view of the disparate bargaining status of the parties we must ascertain that meaning of the contract which the insured would reasonably expect.' "

In *Vanguard*, supra, this Court stated:

> This Court has also recognized that the rule of reasonable expectation comprises "[a]n adjunct to the rules of construction of insurance contracts...." Powers v. DAIIE, 427 Mich. 602, 631, 398 N.W.2d 411 (1986). This rule is particularly applicable in take-it-or-leave-it standardized contracts such as insurance policies.

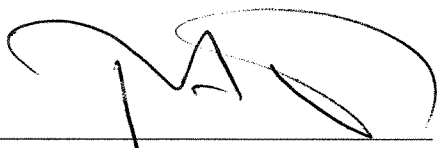
Can it be said today that the reason for the rule, (i.e. the superior position of the insurance company) has changed since 1982? Are insurance policies any less adhesion contracts? Obviously not. Just as in 1982, the insurance contract is drafted unilaterally by the insurance company and is presented to the insured on a take it or leave it basis.

Since the rational for this Court's having adopted the rule of reasonable expectations in 1982 still applies today, the rule continues to be a sound principle of contract law.

RELIEF REQUESTED

The Plaintiff-Appellee Wilkie respectfully requests that the decision and judgment of the Court of appeal be affirmed.

December 9, 2002



Thomas A. Doyle
Attorney for Plaintiff-Appellee Wilkie
THOMAS A. DOYLE, P.C.
504 S. Creyts Rd., Suite C
Lansing, MI 48917
517-323-7366